

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CRIMINAL NO. <u>23-01423 KG</u>
)	
vs.)	
)	
MICHAEL DAVID FOX,)	
)	
Defendant.)	

**UNITED STATES' OBJECTION TO THE PRE-SENTENCE INVESTIGATION
REPORT AND REQUEST FOR AN EVIDENTIARY HEARING**

The United States objects to Paragraphs 9 and 46 of the Pre-sentence Investigation report ("PSR") as inaccurate because the Defendant stated he was *not* under the influence of drugs or alcohol when he committed the offense. See Doc. 30, paras. 9 and 46. Second, the Government objects to U.S. Probation Office's calculation of the total offense level in this case. Id. at para. 26. The Defendant stated that he threatened to kill the U.S. Congresswoman because he believed she was transgender. Exhibits 1, 2. Based on his rationale for threatening to kill her, the Defendant should receive the hate crime motivation enhancement under U.S.S.G. 3A1.1(a) for targeting her based on her perceived gender identity. The United States requests an evidentiary hearing to prove this enhancement.

BACKGROUND

On the evening of May 18, 2023, the Defendant placed a call to the office of a U.S. Congresswoman (Victim 1 or V1). When no one answered the call, the Defendant left a voicemail and stated:

Hey [V1's complete first and last name] you're a *man*. It's official. You're literally a *tranny* and a pedophile and, I am going to put a bullet in your fucking face. You motherfucking, satanic, cock-sucking son of a whore. You understand me you fucker. Exhibit 1 (emphasis added).

Throughout the call, Defendant's voice sounds angry and agitated. Exhibit 1.

On May 26, 2023, FBI Special Agent James Scott interviewed the Defendant about the threat. Exhibit 2. During this interview, SA Scott played a recording of the call to the Defendant, and afterwards, the Defendant immediately stated: "that's me". Exhibit 2 at 4:00 minutes. SA Scott asked the Defendant why he threatened to kill V1, and the Defendant stated: "when I run a skull feature on the face of this woman, her skull features indicate that she was born a man. Id. at 5:30-5:45 minutes. He described a plan known as "Operation Sundown" where 385 members of Congress will be arrested and taken for execution. Id. at 6:10 minutes. He then stated: "I do retract what I said to that *thing*. . . . but my research indicates that we have trannies all over the world running governments, kingdoms—aristocrats, CEOs of the biggest corporations of the world. Trannies... we were infiltrated guys." Id. at 7:15-7:45 minutes (emphasis added). The Defendant stated that he was not intoxicated or under the influence of drugs when he made the phone call. Id. at 9:30 minutes. He then described what he believed are immutable forensic features of a male and female face and stated that he had done research about how "trannies" could modify their faces. Id. at 10:15. He further alluded to watching videos of U.S. Congressmembers speaking and how he would analyze their faces to determine if they were transgender. Id. at 9:30-11 minutes. The Defendant then spent time considerable time detailing various conspiracy theories. He was particularly preoccupied by what he called the "Q-Plan to Save the World". Notably though, when Special Agent Scott redirected the conversation back to

why he threatened to kill V1, the Defendant explained several times how he analyzed her face, determined that she was transgender, and how he believed that transgender individuals had taken over the government and other institutions.

On May 30, 2023, the United States charged the Defendant with 18 U.S.C. § 875(c), Interstate Threatening Communications, for threatening to injure V1, an active member of the U.S. Congress, by shooting her in the face. Doc. 3. On September 20, 2023, the Defendant pleaded guilty to the charge by information. Doc. 25. During the plea colloquy, the Defendant admitted that he threatened to shoot the U.S. Congresswoman in the face and that he was not under the influence of drugs or alcohol when he made the threat.

ARGUMENT

U.S.S.G. § 3A1.1 provides a 3-level enhancement to the base-offense level if the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim as the object of the offense because of the victim's actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation. According to the Commentary to this rule, "gender identity" means actual or perceived gender-related characteristics. *Id.* at Comment 5.

During the law enforcement interview, the Defendant described in detail why he threatened V1. Both the actual threat and his expressed motivation demonstrate that he intentionally selected V1 because he mistakenly believed she was transgender. Exhibits 1, 2. While the United States acknowledges that the Defendant does not appear to possess full rational thought in his beliefs and ideologies—his express motivations are tinged with extremist beliefs about transgender individuals. The total offense level should include the 3-level enhancement under U.S.S.G. § 3A1.1 based on this evidence. If the enhancement applies, the total offense

level would be 13, with a criminal history category of I, and a corresponding guideline sentence of 12-18 months confinement.

Moreover, the Defendant told both the FBI and the U.S. Magistrate Judge that he was not under the influence of drugs or alcohol at the time of the offense of conviction. See Exhibit 2 at 9:30 minutes. The United States moves the Court to amend paragraphs 9 and 46 to correctly reflect the Defendant's mental state at the time of the offense.

CONCLUSION

For all the reasons stated above, the United States respectfully requests that the Court grant the United States' motion that U.S.S.G. § 3A1.1 applies to this case, and enter a factual finding that the Defendant intentionally selected V1 as a victim of the offense because he mistakenly believed she was transgender. The United States further requests that the Court amend the PSR to correctly state that the Defendant was not intoxicated at the time of the offense.

Respectfully submitted,
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Electronically filed 11/30/2023
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I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed on 11/30/2023
LINDY CARPENTER
Assistant United States Attorney